



times to meet the needs of law enforcement and Office of the Medical Investigator (OMI). In recent years, the growing demand for expert witness testimony in DWI cases has diverted manpower from performing lab analyses and cause delays in results which have adversely affected DWI prosecution and the issuance of death certificates. Legislators and the Governor have received complaints about the delays. This bill will help remedy these delays as well as slowing the growth and need for additional FTEs.

## **SIGNIFICANT ISSUES**

A recent appellate court decision in the State v Day case has changed the way that New Mexico courts approach DWI so that the prosecutors in a case now must present an expert witness to “back estimate” what the defendant’s blood alcohol level was at the actual time of the traffic stop. This is a problem for two reasons. First, the Scientific Laboratory Division (SLD) of the DOH, which provides the expert witness for these cases, has only six expert witnesses to cover the approximately 18,000 DWI prosecutions occurring each year in NM. In 2006, SLD received approximately 900 subpoenas for these six individuals to handle, which was beyond their ability. As a result, many DWI cases had to do without an expert witness. In light of the recent appellate decision, this jeopardizes the prosecution of DWI cases throughout the state.

Secondly, the back estimation of blood alcohol levels is difficult to do and requires detailed knowledge of the composition and timing of the defendant’s drinking and/or eating prior to the arrest. Because providing this information to the prosecutor and expert can be viewed as self-incrimination, defendants are not required to provide this information, which prevents the expert witness from back estimating the alcohol level at the time of the traffic stop. This interferes with prosecution of the case.

Twice in the past three years, the New Mexico courts have asked that the legislature to address this issue in the law. This bill will do so and will eliminate the need for expert witnesses from SLD in approximately 90% of the alcohol DWI prosecutions in the state.

The scientific literature indicates that a chemical test for alcohol taken two hours after the driving stop provides a good estimate of the alcohol at the time of the traffic stop. A chemical test for alcohol taken within three hours of the traffic stop will provide an estimate either the same or slightly lower than the alcohol at the time of the traffic stop. In neither case will the reading within three hours of the traffic stop overestimate the alcohol level at the time of the stop.

Approximately 14 other states, as well as Canada, have adopted windows of time for the chemical test up to four hours after the traffic stop.

The three-hour window proposed by this bill mirrors the three-hour window already present in the Boating While Intoxicated law, passed by the legislature in 2003 eliminating inconsistencies between the two laws.

## **ADMINISTRATIVE IMPLICATIONS**

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws

and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

**RELATIONSHIP**

Senate Judiciary Committee Substitute for Senate Bill 440 is similar to, but does not duplicate HB 403, HB 420, HB 478, HB 624, HB 1233 & HB 1247/HJCS which also amend the DWI statute, NMSA 1978, Section 66-8-102

**OTHER SUBSTANTIVE ISSUES**

The concentration of blood-alcohol in the body depends on a number of factors including body weight, gender, presence of food and the type of food in the stomach when alcohol is consumed, the quantity and rate at which drinking alcohol occurs, and the rates of alcohol absorption and metabolism.

For example, the rate at which alcohol is absorbed into the body depends on how quickly the stomach empties its contents into the intestine. Women absorb and metabolize alcohol differently from men. Women have a higher BAC after consuming the same amount of alcohol as men.

Blood alcohol analysis in DWI cases is the attempt to measure the amount of alcohol within the person’s blood at any given time.

This bill appears to rely on the use of retrograde extrapolation. Retrograde extrapolation is the process by which someone’s blood alcohol concentration at the time of driving is estimated by projecting backwards from a later chemical test. This process involves estimating the absorption and elimination of alcohol in the time period between driving and testing.

The use of this process relies on assumptions regarding the amounts of alcohol and food consumed and the time taken to consume the alcohol and food. The process also assumes that absorption of alcohol has been completed and the peak BAC has been reached.

The difficulty in this process is the reasonableness and justifiability of the assumptions made. When reasonable and justifiable assumptions are made alcohol elimination rates of .015 of blood alcohol concentration to .020 blood alcohol concentration per hour can be assumed.

In practical terms this means that an individual who has a BAC of .08 three hours after the stop and arrest will have had a BAC of .04 at the time of the stop. This is calculated as:

BAC Test	First hour	Second hour	Third hour	Extrapolated Measure
.08	- .015	- .015	- .015	= .04

DW/nt